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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO._____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO STATE'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO._____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO STATE'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The State of Arizona, Petitioner, requests permission to file this reply brief pursuant to Rule 24, United States Supreme Court Rules, addressing the improper use of evidence not in the record by the Respondent Washington in his Opposition to the State's Petition for Writ of Certiorari to the United States Court of Appeals.

The Respondent Washington has placed before this Court of last resort six (6) pages of a fifty-six (56) page transcript which was not a part of the record before the Ninth Circuit Court of Appeals or the United States District Court. (Respondent's Appendices A and B)

Specifically, the Respondent has referred to six (6) pages of the Superior Court transcript of the Jury Trial of January 8, 1975, Mr. Bolding's Voir Dire of the Jury Panel.

The Respondent has incorrectly stated in his Reply Brief that the decisions below by the United States District Court and the Ninth Circuit Court of Appeals were "rendered after scrutinizing the entire record of the trial court." (Respondent's Opposition to State's Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit, p.4, lines 15 and 16.).

In fact, the material cited by the Respondent Washington in his appendices was never before the Ninth Circuit Court of Appeals or the Federal District Court.

On July 15, 1976, Judge Chambers of the Court of Appeals for the Ninth Circuit specifically ruled that the whole transcript, including the material cited by the Respondent to this Court, was not to be incorporated into the

record on appeal. (See Appendix A herein). A motion to supplement the record on appeal to include the entire transcript in question was filed by the State. (See Appendix B herein), and the Respondent Washington by written opposition vigorously opposed the State's motion. (See Appendix D herein).

The State strongly contends that the lower courts would have reached a different result if the transcript in question had been before them in the case at bar since the transcript shows the trial judge believed the jury panel would be "poisoned" and unable to render a fair and impartial verdict if it learned of the reason for the Respondent's new trial.

The State of Arizona submits that the Respondent's reference to six (6) pages of a fifty-six (56) page trans-

cript not on the record is inappropriate before this Court. However, since the material is now before the Court, the State requests that in order to clarify misrepresentations made by the Respondent regarding the transcript that the whole transcript be made a part of the record at this time. Reference to the whole transcript, demonstrates how the Respondent has misconstrued the language contained in his appendices "A" and "B".

A close examination of Respondent's appendices clearly shows that the Respondent entirely misrepresented the language contained therein. Rather than demonstrate any acquiescence or agreement by the prosecutor that claims of hidden evidence or prosecutorial misconduct were relevant trial issues, the Respondent's appendices unequivocally show that the only matter acquiesced

in or agreed upon was that if any jurors knew of the reasons for the new trial of Respondent those jurors might be prejudiced and thus unable to render a fair and impartial verdict. The sole purpose of the voir dire contained in Respondent's appendices and the transcribed proceedings they are a part of was to find and exclude from the jury anyone with knowledge of the reason for the new trial.

In addition, while the State of Arizona does not believe the trial judge was required to couch his reasons for a mistrial in words of "manifest need" or an "impartial verdict," the Respondent's appendices prove that the trial judge, realizing the consequences of a mistrial decision, felt there was a potential and developing legal basis for a mistrial. In considering

the propriety of the jury panel knowing the reason for the new trial, the trial judge expressed "he was a little concerned with the poisoning of the panel, that someone might blurt out --." (Respondent's Appendix A, p. 35, lines 9 - 11). Thus, the above language of the trial judge, had the complete trial court record been before United States District Court Judge James A. Walsh in the Federal habeas corpus hearings, would have answered Judge Walsh's concern that the State trial "[j]udge doesn't anywhere say, that I can find, why he believes that . . . it's not going to be possible for the jury to be impartial or render an impartial verdict." (Appendix E herein); Record on Appeal, "Reporters Partial Transcript of Proceedings in the District Court of October 2, 1975,

"Mr. Butler's argument, pages 4 - 5, lines 12-2).

The language of the trial judge about the potential for the "poisoning of the panel" alleviates the doubt that Judge Walsh apparently had that the trial judge was just "going along" with the prosecutor's request for a mistrial. It is obvious from his choice of words that the trial judge himself recognized the potential legal basis for a mistrial if the jury panel were "poisoned" by discovering the reason for the new trial.

This concern of the trial judge occasioned a painstaking interrogation by the Court and the prosecutor to determine that no one juror knew or even guessed the reason for the new trial. Nevertheless, despite the deliberate interrogation in voir dire on this issue of the reason for a

new trial, Respondent's counsel did "blurt out" the reason for the new trial in his opening statement.

This "blurting out" by Respondent's counsel by declaring that the Arizona Supreme Court had condemned the prosecutor for misconduct by withholding evidence and had granted a new trial became the compelling reason for the trial judge to declare a mistrial. The trial judge obviously believed that this improper argument by Respondent's counsel had "poisoned" the trial jury and rendered the trial jury unable to arrive at a fair and impartial verdict.

Respondent contends that the cases in the State's Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals are not applicable because of their particular facts. While the State recognizes that each decision

is based on the particular facts of that case, nevertheless the legal principles involved should be consistently applied. Contrary to Respondent's argument, the essence of Illinois v. Somerville, 410 U.S. 458 (1973) and United States v. Potash, 118 F.2d 54 (2d Cir., 1941) is that rigid mechanical rules regarding mistrials are not to be applied by the trial judge in exercising his discretion. The principle of United States v. Dinitz, _____U.S. _____, 96 S.Ct. _____, 47 L.Ed.2d 267 (1976) that when defense counsel's conduct necessitates a mistrial, the defendant should be barred from raising a double jeopardy defense is especially relevant to the instant case because the transcript cited by the Respondent in his Reply Brief shows that defense counsel knew that

matters relating to the reasons for a new trial were not to be discussed before the jurors.

CONCLUSION

In conclusion, the State of Arizona respectfully requests that because the Respondent Washington has improperly introduced before this Court selective parts of a transcript not in evidence that the whole transcript now be admitted before this Court.

Although the State strongly believes that the trial court need not use talismanic language regarding the granting of a mistrial, such language is in fact found in the material cited by the Respondent in his Reply Brief. The transcript referred to by the Respondent clearly shows that defense counsel knew that the trial judge was

concerned that the jury panel could become "poisoned" by learning of the reasons for a new trial and yet defense counsel specifically told the jury these reasons in his opening statement. Because the whole transcript supports the State's position before this Court, the State requests that the entire transcript now be introduced before the Court.

Respectfully submitted this 31st day of March, 1977.

JOHN R. McDONALD
Special Deputy
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111 West Congress Street
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Attorney for Petitioner

(handwritten)

July 15, 1976 -

The motion to supplement the record is denied because the material was not before Judge Walsh. If appellee has imported into the record here material that was not before Judge Walsh, appellant should move to strike it.

(s) R. H. Chambers, Judge.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR.,	)	
	)	No: 75-3634
Appellant,	)	
	)	(United States
vs.	)	District Court
	)	No. CIV-75-85-
THE STATE OF ARIZONA,	)	TUC-JAW)
WILLIAM C. COX, Sheriff,	)	
Pima County, Arizona,	)	
	)	
Appellee.	)	
	)	
	)	

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

DENNIS DeCONCINI
PIMA COUNTY ATTORNEY

(s) A. BATES BUTLER III

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR., Appellant, vs. THE STATE OF ARIZONA, WILLIAM C. COX, Sheriff, Pima County, Arizona, Appellee.	No: 75-3634 (United States District Court No. CIV-75-85-TUC-JAW)

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

COMES NOW Appellee, the State of Arizona and William C. Cox, Sheriff, Pima County, Arizona ("the State") and, pursuant to Rule 10 (e) of the Federal Rules of Appellate Procedure, moves to supplement the contents of the Record on Appeal, specifically, Appellant's (now Appellee's) Exhibit No. 1, in Case No. 75-3634, with the following;

(1) Superior Court Transcript of Jury Trial, January 8, 1975, Mr. Edward Bolding's Voir Dire of Jury Panel.

As this Court is aware from the State's "Notice Pursuant to Rule 10 (b)" [Record on Appeal, page 229], the State's primal issue on appeal, and correspondingly, the meat of the State's brief, is "[w]hether the District Court erred in granting Petitioner a Writ of Habeas Corpus for the stated reason that the State trial court did not expressly state in his order that manifest necessity existed for granting the State's Motion for Mistrial." (An issue inseparably entwined in the State's appeal--whether manifest need existed for the State trial court to declare a mistrial--is also discussed by the State in its brief.) This mistrial occurred at a second trial of George Washington, Jr. ("Washington") upon request of the Deputy County Attorney, over Washington's objection, because of defense counsel's prejudicial remarks to the jury in his opening statement. The supplemental material, the Transcript of the Jury Trial ("Supplemental Transcript"), represents a portion of Washington's second trial. This portion has heretofore never been transcribed. The other portion of the transcript of Washington's second trial, already before this court as part of the Record on Appeal [see above], was transcribed January 15, 1975. Therein, the court reporter outlined this previously untranscribed portion which the State now wishes to include in the Record on Appeal--

"(Following proceedings were resumed in open court, another roll call of the jurors and voir dire examination of prospective

jurors by Mr. Bolding, whereupon a recess was taken and several jurors called in and questioned individually by the Court and counsel and another recess was taken for the purpose of allowing the attorneys to strike prospective jurors.)" Record on Appeal, Appellant's Exhibit No. 1, "Jury Trial of January 8, 1975, Superior Court, page 44, lines 12-19.

The State was not the party who requested the original transcription and therefore does not have knowledge or remember why the proceedings in the Supplemental Transcript were excluded therefrom. However, the State believes the Supplemental Transcript is imperative for this Court's eventual decision of the case at bar, which naturally entails a full understanding of the events that transpired at Washington's second trial.

The language of the foregoing statement of the State's issue on appeal itself announces that this issue was first created by the ruling of the district court wherefrom the State has appealed to this Court. During Washington's federal habeas corpus hearing, held October 2, 1975, United States District Court Judge James A. Walsh sua sponte challenged the State with the problem that Superior Court Judge Robert B. Buchanan, in Washington's second trial, did not express "finding" that manifest necessity existed for a mistrial. Judge Walsh was concerned that, from

the record before him, Judge Buchanan "doesn't give any indication" that he thought defense counsel's remarks might cause the jury to reach an improper result [Record on Appeal, "Reporter's Partial Transcript of Proceedings in the District Court of 12/2/75", Mr. Butler's argument, page 3, lines 7-14]; that the State trial "[j]udge doesn't anywhere say, that I can find, why he believes that . . . it's not going to be possible for the jury to be impartial or render an impartial verdict" [ibid., pages 4-5, lines 23-2]. Judge Walsh also expressed repeated concern with Judge Buchanan's attitude, that Judge Buchanan was perhaps "inclined to go along with [the County Attorney] after [the County Attorney] told him, 'Look, I know the consequences. . .'" of a mistrial declaration [ibid., page 9, lines 21-24]. The State is aware that the Supplemental Transcript was not part of the record before the district court's consideration.[1] However, since the State's primary issue on appeal to this Court was first raised by Judge Walsh himself, neither party had briefed the issue to the District Court, nor had either party considered beforehand the presentation or reference to evidence, such as statements made on the record by Judge Buchanan, that might signify to Judge Walsh a legal expression sufficient to support a mistrial ruling. In other words, the State's issue on appeal to this Court which makes this previously untranscribed portion of Washington's second trial now relevant and essential to the outcome of the case, was not an

---

1. The State wishes to point out that the Record on Appeal already includes material that was not before Judge Walsh's consideration in the habeas corpus proceeding, namely, Cross-Appellant's Exhibit A, placed in the Record by Washington before transmittal to this Court.

issue presented by the parties to the District Court. Judge Walsh himself raised it in oral argument.

While the State realizes an argument of its appeal is misplaced in this Motion, some discussion of the pivotal issues therein is necessary in explanation of the reasons why the Supplemental transcript is so necessary to a complete record for the State's appeal. This Court will be deciding whether or not Judge Buchanan had to co[illegible]h his reasons for a mistrial in w[illegible]s of "manifest need," or "an impartial jury". The State will admantly argue that he has no such requirement, but the addition of this supplemental transcript to the Record on Appeal will serve to alleviate doubt that, before the County Attorney told the trial court he knew the consequences of his request, Judge Buchanan himself felt there was a potential and developing legal basis for a mistrial, that he was not just "going along" with the County Attorney- a doubt which apparently played a major role in Judge Walsh's decision. On this important point, Judge Buchanan, during initial voir dire, expressed he "was a little concerned with the poisoning of the panel, that someone might blurt out--". Supplemental Transcript, page 35, lines 9-11. This concern occasioned a painstaking interrogation by Judge Buchanan and the County Attorney to determine that no one juror knew or even guessed the reason for the new trial (which interrogation can be shown only by

the Supplemental Transcript). Nevertheless, even after the deliberate interrogation, "someone", namely defense counsel, did, in fact, twice "blurt out" the reason for the new trial in his opening statement. As the Court will find in the State's brief, this "blurting out" finally became the compelling reason for Judge Buchanan to declare a mistrial.

In Turk v. United States, 429 F.2d 1327, 1329 (8th Cir. 1970), the Eighth Circuit was presented with an issued substantially similar to the issue before this Court, and ruled as follows:

> "In its appellate brief the government refers to additional evidence of probable cause contained in the transcript of the preliminary hearing held before the United States Commissioner on December 3, 1968. This testimony was not presented to the district court and was not otherwise made a part of the record on this appeal. Fed.R. App.P. 10 (a). However, in the interest of justice this court may order the record enlarged for purposes of reviewing the issue of probable cause." (Emphasis added.)

To the same effect is Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953) where the Court recognized but ignored the usual rule that if a party fails to bring up a sufficient record

to reveal the error he alleges, his appeal must fail. The Court instead followed a procedure which seemed to them "called for in the interest of both parties, and of the due administration of justice" [209 F.2d 789, 792 n. 5] and supplemented the record under the following rationale:

> "Appellate consideration of the ultimate question in a case must not be frustrated by the parties' failure to include in the record preliminary proceedings which were in reality part of the trial process, and which might be found to be of vital significance." Ibid.

Accord, Phillips Petroleum Company v. Williams, et al., 159 F.2d 1011, 1012 (5th Cir. 1947).

The reasoning of both Turk and Gatewood seems particularly compelling in the case at bar. In Turk, the basic issue on appeal was probable cause for an arrest to justify a warrantless search, and the reviewing Court allowed evidence regarding probable cause to supplement the record. In the case at bar, the basic issue on appeal stems from Judge Walsh searching the record before him for some indication of Judge Buchanan's expressed attitude that the jury was becoming partial, for some indication of what was in the State trial judge's mind. This Supplemental Transcript fills a huge gap in report colloquy between counsel and the jurors and between

counsel and the court, and serves to illuminate the State trial court's mindful consideration, through express statements, of developing prejudice in the jury. The Supplemental Transcript therefore serves to militate against Judge Walsh's arguments, and shores up the State's contention, which will be made in its Brief, that Judge Buchanan, practically from the outset of the trial, was constantly concerned that the jury not become prejudiced against either the State or the defendant. Without this Supplemental Transcript, this Court will not be nearly as well-equipped to decide the issue that the State presents. The State respectfully requests that since the State's primal issue on appeal was not brought before the parties until the district court's ruling, and in the interest of justice to both parties to the appeal, the Record on Appeal in Case No. 75-3634 be supplemented with the Superior Court Transcript of Jury Trial, January 8, 1975, of Mr. Edward Bolding's Voir Dire of the Jury Panel.

Dated this (7) day of July, 1976.

Respectfully submitted,

DENNIS DeCONCINI
PIMA COUNTY ATTORNEY

(s) A. BATES BUTLER III

A. Bates Butler, III
Deputy County Attorney

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR.,	)	
	)	
Appellant,	)	No. 75-3634
	)	
vs.	)	(United States
	)	District Court
THE STATE OF ARIZONA,	)	No. CIV-75-85-
WILLIAM C. COX, SHERIFF,	)	TUC-JAW)
Pima County, Arizona.	)	
	)	
	)	

Pursuant to the suggestion of Chief Judge Chambers in his Minute Order of May 19, 1976 in Cause 75-3634, United States Court of Appeals for the Ninth Circuit, I have examined the transcript material described on Page #1 of Appellant's Motion to Supplement the Record on Appeal filed in said Cause 75-3634 on May 6, 1976, and I certify that such material was not before me when I heard and decided Appellant's application for a Writ of Habeas Corpus in Cause No. 75-85-Tucson (JAW), in the United States District Court for the District of Arizona.

Dated at Tucson, Arizona: June 2, 1976.

(S) James A. Walsh
United States District
Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR.,	)	
	)	No: 75-3634
Appellant,	)	
	)	(United States
vs.	)	District Court
	)	No. CIV-75-85-
THE STATE OF ARIZONA,	)	TUC-JAW)
WILLIAM C. COX,Sheriff,	)	
Pima County, Arizona,	)	
	)	
Appellee.	)	
	)	

OPPOSITION TO MOTION TO SUPPLEMENT RECORD ON APPEAL

BOLDING, OSERAN & ZAVALA

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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR.,	)	
	)	No: 75-3634
Appellant,	)	
	)	(United States
vs.	)	District Court
	)	No. CIV-75-85-
THE STATE OF ARIZONA,	)	TUC-JAW)
WILLIAM C. COX,Sheriff,	)	
Pima County, Arizona,	)	
	)	
Appellee.	)	
	)	

OPPOSITION TO MOTION TO SUPPLEMENT RECORD ON APPEAL

COMES NOW Appellant, GEORGE WASHINGTON, JR., by and through his attorneys, BOLDING, OSERAN & ZAVALA, by Ed Bolding, and herewith opposes Appellee, STATE OF ARIZONA's Motion to Supplement the Record on Appeal, for the reasons set forth below in the Memorandum of Points and Authorities.

Respectfully submitted this 8th day of July, 1976.

BOLDING, OSERAN & ZAVALA

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Attorneys for Appellant

APPENDIX D

MEMORANDUM OF POINTS AND AUTHORITIES

On April 30, 1976, Appellee, STATE OF ARIZONA, filed its first Motion to Supplement Record on Appeal. Thereafter, on May 19, 1976, the Honorable Richard H. Chambers, of this Court, ruled as follows:

> Denied without prejudice. From Judge Walsh's Order of August 5, 1975, I conceive it possible that Judge Walsh did examine and consider the material which the U. S. Attorney now desires to put in the record.
>
> Perhaps Judge Walsh can file in a Memorandum in his Court's file that will clear up the matter and then a new application can be made.

On June 2, 1976, Judge Walsh certified:

> . . . I have examined the transcript material described on Page #1 of Appellant's Motion to Supplement the Record on Appeal filed in said Cause 75-3634 on May 6, 1976, and I certify that such material was not before me when I heard and decided Appellant's application for a Writ of Habeas Corpus in Cause No. 75-85- Tucson (JAW), in the United States District Court for the District of Arizona.

Now, the STATE has renewed its same Motion to Supplement the Record on Appeal with the single exception that the deposition of Alonzo Rodriguez is not again offered for supplementation.

It is well-settled that a United States Court of Appeals may only consider the facts and evidence which were made a part of the record in the District Court. Rule 10(a) Federal Rules of Appellate Procedure. In denying the government's Motion to Supplement the Record on Appeal, the Seventh Circuit Court of Appeals stated the following:

> We do not think Rule 10(e) of the Federal Rules of Appellate Procedure gives us authority to admit on appeal a document, file, or series of papers, which neither were introduced into evidence, nor, in any manner, made a part of the record in the District Court. United States ex rel Kellogg v McBee, 452 F 2d 134 (7th Cir., 1971).

See Dictograph Products Company v. Sonotone Corporation, 231 P 2d 867 (2nd Cir., 1956). In Borden, Inc., v. FTC, 495 F 2nd 785 (7th Cir., 1974), again the Seventh Circuit Court of Appeals denied a Motion to Supplement or Enlarge the Record on Appeal, stating:

> [R]ule 10(e) does not give this Court authority to admit or appeal any document which was not made part of the record in the District Court.

In Gill v. Turner, 443 F 2d 1064, 1065 (10th Cir., 1971), Appellant attempted to expand the Record on Appeal to include a transcript of an arraignment which was not introduced at the trial court level. In rejecting Appellant's Motion the Court stated:

> Suffice it to say in this regard that the record as previously made before the trial court cannot be thus expanded when the matter is on appeal before us. Our task here is to review the finding and judgment of the trial court in light of the record before it.

Additionally, in United States ex rel Bradshaw v. Alldredge, 432 F 2d 1248, 1250 (3rd Cir., 1970), the Court noted:

> It is, of course, black letter law that the United States Court of Appeals may not consider material or purported evidence which was not brought up on a record in the trial court.

To the same extent in Weiss v. Burr, 484 F 2d 973, 989 (9th Cir., 1973), this Court refused to supplement the record subsequent to issuing its opinion when Appellant sought to supplement the record with his Petition for Rehearing, stating:

> [T]his we refuse to do, since as heretofore stated, that transcript of proceedings was not before the District Court.

In short, the law as to supplementation is clear - that the Appellee herein cannot supplement this record on appeal with matters which were heretofore not before our District Court. To permit the supplementation would sanction impeaching the record which "speaks for itself."

Appellee cites Turk v. United States, 429 F 2d 1327 (8th Cir., 1970), and Gatewood v. United States, 209 F 2d 789 (D.C. Cir., 1953), for the proposition that this Court has the authority to supplement the record with matters not presented to the District Court, provided that the supplementation is in the "interests of justice."

It is apparent that the STATE OF ARIZONA is attempting to insert something in the record so that it might try to influence this Court to "second guess" the ruling made by Judge Walsh. There is absolutely no showing that the ruling by Judge Walsh would have been any different had the STATE OF ARIZONA chosen to include what it

now attempts to insert in the record for consideration by Judge Walsh on the initial hearing. To the contrary, it is apparent that a different ruling would not have been made, since Judge Walsh obviously would have so indicated in his June 2, 1976, ruling, if a change in the ruling was in order.

GEORGE WASHINGTON, JR., submits that supplementation here would not be in the "interests of justice," would be violative of the spirit and intent of Rule 10 of the Federal Rules of Appellate Procedure, and would further "muddy the waters" with collateral and irrelevant materials.

Other parts of the record exist which neither the STATE OF ARIZONA nor GEORGE WASHINGTON, JR., felt were necessary for a proper decision to be made by Judge Walsh. At least that feeling evidently existed up until the time Judge Walsh made the decision whch was adverse to the STATE OF ARIZONA.

What is plainly evident is that this Court has all the necesary "record" to render an appropriate decision. As this Court well knows, the STATE designated the Record on Appeal and now regards it as not adequately presenting the issues. There can be little question but that the STATE has had more than ample opportunity to set forth a concise yet full presentation of its argument without having to include the instant material. The STATE's Motion to include these items is tantamount to "putting everything in the record but the kitchen sink."

In sum, WASHINGTON submits that the Motion to Supplement the Record should be denied in that the matters sought to be included are plainly not germane to this appeal.

Respectfully submitted this 8th day of July, 1976.

BOLDING, OSERAN & ZAVALA

By ED BOLDING
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Attorneys for Appellant

Actually, the one thing which bothers me and which I think had an effect on Judge Buchanan that led him to change his ruling was the fact that you stated to him very frankly, "Judge, I realize if I'm wrong in getting this mistrial, this man walks, and I'm so convinced of my standing I'm willing to take that chance." He at that point, as I recall, said something to you about, "Do you realize you didn't make an objection when this statement was made?" and you agreed that you did realize that. And I think Judge Buchanan thought, "Well, I made a ruling yesterday and now the County Attorney tells me I'm wrong and he is willing to stake everything on my changing my mind," because the Judge doesn't anywhere say, that I can find, why he believes that there is manifest necessity or that it's not going to be possible for the jury to be impartial or render an impartial verdict. He doesn't make any finding. This is my problem with it.

APPENDIX E

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO._____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

Respondent.

NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Petitioner.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By: John R. McDonald
John R. McDonald
Special Deputy
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111 West Congress Street
Tucson, Arizona 85701
Attorney for Petitioner.

STATE OF ARIZONA)
) ss.
County of Pima)

I, JOHN R. McDONALD, hereby certify that I have served a copy of the foreging Reply Brief to Respondent's Opposition to State's Petition for Writ of Certiorrari to the United States Court of Appeals for the Ninth Circuit upon Respondent George Washington, Jr., by delivering a copy of the same in the United States Mail, with postage prepaid, addressed to Edward P. Bolding, Esq., La Placita Village, Suite 402 Toluca Building, P.O. Box 70, Tucson, Arizona 85702, attorney for Appellant, this 31 day of March, 1977.

John R. McDonald
JOHN R. McDONALD

SUBSCRIBED AND SWORN to before me this 31 day of March, 1977, by JOHN R. McDONALD.

Rhonda L. Fitzpatrick
Notary Public

My commission expires:

1-9-81